



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

October 13, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8845

OR2003-7246

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189282.

The City of Austin (the "city") received a request for information related to Internal Affairs Investigation 02-315. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. To the extent that it exists, we presume that you have released any remaining requested information. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including

background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, No. 03-02-00785-CV, slip op., 2003 WL 21241652, at *7 (Tex. App.—Austin May 30, 2003, no pet. h.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into an officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at *5, *7. Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055. Such records are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).¹

A qualified civil service municipality may elect under subchapter I of Chapter 143 of the Local Government Code to enter into an agreement with a police association regarding “wages, salaries, rates of pay, hours of work, other terms and conditions of employment, [and] other personnel issues.”² Local Gov't Code § 143.303. When a qualified municipality enters into such an agreement, the agreement “supercedes a previous statute concerning wages, salaries, rates of pay, hours of work, or *other terms and conditions of employment* to the extent of any conflict with the statute” and “preempts any contrary statute, executive order, local ordinance, or rule adopted by the state or a political subdivision or agent of the state including a personnel board, a civil service commission, or a home-rule municipality.” *Id.* § 143.307(a), (b) (emphasis added). However, an agreement “may not diminish or qualify any right, benefit, or privilege of any employee under this chapter or other law” unless the change is approved by a majority of the police association. *Id.* § 143.307(c).

You inform us that in March 2001, the City of Austin and the Austin Police Association entered into an agreement pursuant to subchapter I. You have provided us with a copy. *See*

¹We note that section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee. You inform us that you have done so.

²Subchapter I of Chapter 143 of the Local Government Code applies in part to a municipality with a population of 460,000 that operates under a city manager form of government. *See* Local Gov't Code § 143.301. The submitted Agreement indicates that the city is such a qualified municipality.

Agreement Between The City of Austin and The Austin Police Association March 25, 2001 -- September 26, 2003 (hereinafter "Agreement"). Section 12 of Article 16 of the Agreement establishes a civilian oversight process. Agreement, Art. 16, § 12, p. 33. Exhibit B of the Agreement outlines a process in which the Police Monitor (the "Monitor") acts as an observer and advisor during investigations by the department's Internal Affairs Division (the "division") and is authorized to receive complaints from the public and to refer such complaints to the division. *Id.* Ex. B, § I(B)(3)(a)-(d), pp. 2-3. The Agreement gives the Monitor access to department disciplinary information, including otherwise confidential departmental files. *Id.* § I(B)(3)(e), p. 3. The Monitor is also authorized under the Agreement to attend witness interviews and request that the division contact a particular witness or collect certain evidence. *Id.* § I(B)(3)(f)-(g), pp. 3-4. Additionally, the Agreement states that the Monitor may request that the Citizen Review Panel review certain complaints. *Id.* § I(C)(4)(b)(i)-(ii), p. 10-11. However, the Agreement forbids the Monitor from having any direct, independent contact with any witness and from asking questions or otherwise interfering with the department's disciplinary process. *Id.* § I(B)(3)(g)-(h), p. 3. The Agreement provides that the division "is solely responsible for investigating a complaint except when an independent investigation is authorized pursuant to this Oversight process." *Id.* § I(B)(3)(g), p. 4. Furthermore, the Agreement mandates that the Monitor and her staff and the Citizen Review Panel are subject to the Agreement's confidentiality requirements. *Id.* § I(B)(3), p. 2. These confidentiality requirements provide as follows:

Disciplinary files maintained by the Austin Police Department are confidential. The Police Monitor, his staff, and the [Citizen] Review Panel members, may not discuss or release the contents of those files with any person other than members of the Review Panel, the Chief of Police or his designee, the Internal Affairs Division, the City Manager or his Designee, the City of Austin Law Department, and [within certain limitations] the accused employee.

Id. § I(G), p. 15. The Agreement also provides that "the City shall maintain all Internal Affairs complaints and investigations in personnel files maintained by the department for the department's use pursuant to the Texas Local Government Code, Section 143.089(g), except as herein amended." Agreement, Art. 16, § 12, p. 33.

You state that the requested information relates to an investigation into possible misconduct by a city police officer and that no disciplinary action has been taken against the officer named in the information. You indicate that the city therefore maintains the requested information in the police department's internal file. We note that the Agreement creating the Police Monitor neither authorizes nor requires the release of this information. Therefore, based on your representations and our review of the submitted documentation, we agree that the requested information pertains to an internal affairs division investigation that has not resulted in disciplinary action against any officer. As such, this information is confidential

under section 143.089(g) of the Local Government Code and must be withheld pursuant to section 552.101 of the Government Code.

In some circumstances, a requestor may have a special right of access to information that is otherwise confidential. Section 552.023 states in relevant part:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

Gov't Code § 552.023. We note, however, that section 552.023(b) provides that a governmental body "may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests." *Id.* In this instance, the information at issue is confidential under section 143.089(g) of the Local Government Code for reasons other than the protection of the requestor's privacy interests. In addition, this office has interpreted section 143.089 to grant a right of access only to the information in the personnel file maintained under section 143.089(a). *See* Open Records Decision No. 650 at 3 (1996) (confidentiality provision of section 143.089(g) contains no exceptions). Therefore, the requestor does not have a special right of access to any portion of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 189282

Enc. Submitted documents

c: Mr. Juan Gonzalez
3009 F.M. 1704
Elgin, Texas 78621
(w/o enclosures)